Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BRUCE PHILIP LARSON, Petitioner,

v.

STATE OF MINNESOTA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a Competent, Available Witness Does Not Testify, Does the General Confrontation Clause Rule Requiring Unavailability Before Out-of-Court Statements are Admissible, Ohio v. Roberts, or the Exception to this Rule in cases of Statements of Co-Conspirators, United States v. Inadi, Govern the Admissibility of Out-of-Court Statements Which Do Not Meet Any of the Traditional Exceptions to the Hearsay Rule?

2. Is a Witness "Available" for Confrontation Clause Purposes Merely Because the Witness Can be Called to Testify at Trial by the Accused?

3. Is the Constitution Violated When a Defendant is Required to Expressly Demand the State to Call a Witness in Order to Exercise His Right of Cross-Examination?

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PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioner, Bruce Philip Larson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Minnesota Supreme Court entered in the above entitled matter on July 12, 1991.

I.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, upon remand from this Court, Larson v. Minnesota, ___U.S.___, 111 S. Ct. 29 (1990), will be reported at 472 N.W.2d 120 (Minn. 1991), and is attached as Appendix I. Final Judgment is attached as Appendix II.

The original opinion of the Minnesota Supreme Court is reported as State v. Larson, 453 N.W.2d 42 (Minn. 1990), and is

attached as Appendix A. The Order of this Court granting the Petition for Certiorari, vacating the judgment, and remanding for further consideration, entered on October 1, 1990, is attached as Appendix III. (The opinion of the Minnesota Court of Appeals is not attached but is reported as State v. Larson, 447 N.W.2d 593 (Minn. Ct. App. 1989)).

II.

JURISDICTION

After a jury trial, petitioner was convicted of a single act of criminal sexual conduct in the second degree, (sexual contact), and filed a timely appeal. After decisions by the Minnesota Court of Appeals and the Minnesota Supreme Court were entered, petitioner filed a Petition for a Writ of Certiorari with this Court. This Court granted the Petition,

vacated the judgment, and remanded the case for further consideration in light of Idaho v. Wright, 497 U.S. ___, 110 S. Ct. 3139 (1990). Upon remand, the Minnesota Supreme Court affirmed the conviction.

This Court has jurisdiction to review the judgment of the Minnesota Supreme Court by Writ of Certiorari pursuant to section 1257 (a), Title 28, U.S.C.

III.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ....

SECTION ONE, UNITED STATES CONSTITUTION AMENDMENT XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IV.

STATUTES/RULES INVOLVED

RULE 803 (24), MINNESOTA RULES OF EVIDENCE:

Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the

interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address, and present whereabouts of the declarant.

MINNESOTA STATUTE, § 595.02, SUBD. 3:

595.02. Testimony of witnesses.

Subd. 3. Certain out-of-court statements admissible. An out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341,

subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child or person mentally impaired as defined in section 609.341, subdivision 6, either:

(i) testifies at the proceedings; or

(ii) is unavailable as a witness and there is corroborative evidence of the act; and

(c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

V.

STATEMENT OF THE CASE

On November 2, 1987, petitioner was charged in Martin County District Court with a single count (multiple acts over an extended period of time) of criminal sexual conduct in the first degree (sexual penetration) with his daughter. The allegations first arose amidst petitioner's divorce and child custody dispute in May, 1987. Family court proceedings were immediately initiated and seven months later the criminal charge was filed. Petitioner asserted his innocence and maintained that the conduct did not occur or was perpetrated by someone else.

TRIAL. After the state filed notice of intent, pursuant to Minnesota Statute section 595.02 subd. 3, to use a number of out-of-court statements made by his

daughter, petitioner requested a hearing to challenge the constitutionality of the use of such statements. After a hearing on June 16, 1988, the trial court ruled the out-of-court statements were admissible, assuming for the purposes of that hearing that the child was incompetent. The trial court reconsidered its ruling in light of this Court's decision in Coy v. Iowa, 487 U.S. 1012 (1988), and held that, assuming the unavailability of the victim, all the out-of-court statements of the witness were admissible, but the video tape of one of the statements was not admissible.

On August 30, 1988, pursuant to petitioner's request, the trial court held a competency hearing and found petitioner's daughter, who was then 5 years old, to be competent to testify. The state, however, did not call this witness at trial, but

instead offered the out-of-court statements she made in response to questioning on four separate occasions: (1) May 1, 1987 to a physician's assistant; (2) May 7, 1987 to law enforcement officers; (3) October 22, 1987 to a therapist; and (4) November 24, 1987 to law enforcement officers. Petitioner noted his continuing constitutional objections before trial and objected on the basis of hearsay during trial.

On September 3, 1988, the jury found petitioner guilty of a lesser offense, a single act of criminal sexual conduct in the second degree (sexual contact). On November 14, 1988, the trial court sentenced petitioner to 24 months in prison. The trial court stayed execution of this sentence pending appeal.

APPEAL. Petitioner appealed his

conviction to the Minnesota Court of Appeals. That court found that petitioner's rights to confrontation and due process were violated by admission of the out-of-court statements where the witness was available and did not testify, but remanded the case for "re-enunciation of the basis for the trial court's competency determination." State v. Larson, 447 N.W.2d 593, 600 (Minn. Ct. App. 1989)

Petitioner filed a petition for review of the decision of the Court of Appeals with the Minnesota Supreme Court, only challenging this unusual type of relief. The petition was granted and the Minnesota Supreme Court by a 6-1 decision, (without requesting further briefing or argument), found no constitutional violation in admitting out-of-court statements, under the residual exception to hearsay rule,

Rule 803 (24), Minn. R. Evid., even though the available declarant did not testify. The court issued its opinion reversing the decision of the Court of Appeals and affirming the judgment of conviction. A Petition for Rehearing was denied. State v. Larson, 453 N.W.2d 42 (Minn. 1990)(Larson I); Appendix A.

PETITION FOR WRIT OF CERTIORARI. Petitioner filed a Petition for a Writ of Certiorari with this Court on July 25, 1990. On October 1, 1990, this Court granted the Petition, vacated the judgment, and remanded for further consideration in light of Idaho v. Wright, 497 U.S.___, 110 S. Ct. 3139 (1990). Larson v. Minnesota,___ U.S.___, 111 S.Ct. 29 (1990); Appendix III.

REMAND. Upon remand, after briefing and arguing both "unavailability" and "reliability", the Minnesota Supreme Court

affirmed the judgment of conviction, again by a decision of 6-1 though membership of the court had changed.

The court re-examined the reliability of the out-of-court statements admitted in this case in light of this Court's analysis in Idaho v. Wright, supra. It held that one statement was admissible under the medical treatment exception,[1] two statements were reliable under the analysis required by Wright and admissible pursuant to the residual exception to the hearsay rule[2], and one statement did not qualify as reliable under Wright and was improperly admitted. Appendix I, at 21-2, 29-32. The court found the erroneously admitted statement to be harmless error. State v. Larson, 472 N.W.2d 120, ___ (Minn.

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[1] Rule 803 (4), Minn. R. Evid.

[2] Rule 803 (24), Minn. R. Evid.

1991)(Larson II); Appendix I, at 32.

The majority opinion only addressed the question of unavailability in a lengthy footnote. (Appendix I, n.1 10-16). There, it noted the confusion among commentators as to the unavailability requirement and the significance of the decision in Idaho v. Wright, supra, on this point. Appendix I, at 13-14 n.1. It also noted that this Court had granted certiorari in a case raising the issue of unavailability, White v. Illinois, 198 Ill. App. 3d 781, 555 N.E.2d 1241, leave to appeal denied, 133 Ill. 2d 570, 561 N.E.2d 705 (1990), cert. granted 111 S. Ct 1681 (1991). Appendix I, at 15 n.1. Nonetheless, the court reiterated its position that, pursuant to its analysis of United States v. Inadi, 475 U.S. 387 (1986), the constitution did not require a showing of unavailability as a

prerequisite for admission of out-of-court statements of a witness under the residual exception to the hearsay rule. Appendix I, at 10-16 n.1; See also Appendix A, 11-16.

The Minnesota court, again relying on its interpretation of Inadi, also reiterated its earlier ruling that, since petitioner could have called the declarant as a witness at trial to confront her, there was no confrontation violation in this case. Appendix I, at 15-16 n.1; See also Appendix A, 13-15. Acknowledging constitutional concerns with requiring the accused to call a witness to obtain confrontation, the majority reiterated its prospective evidentiary rule, requiring the state to call available witnesses whose out-of-court statements are admitted against defendants when expressly requested

to do so by the defendant. Id.

Justice Tomljanovich in her dissent did not agree that "the confrontation clause of the sixth amendment permits the state to substitute hearsay for the in-court testimony of an available witness in the particular circumstances presented by this case." Appendix I, at 33. Reviewing this case "in light of Idaho v. Wright", Justice Tomljanovich stated that the "general rule" of Ohio v. Roberts, 448 U.S. 56 (1980)(requiring unavailability of the declarant), continued in effect despite the decision in United States v. Inadi, 475 U.S. 387 (1986), and in fact was reaffirmed by this Court in its decision in Wright. Appendix I, at 41-43.

Justice Tomljanovich found that the out-of-court statements were not constitutionally admissible and that the

creation of a new prospective rule of evidence (requiring the state to call an available declarant if the defendant so requests) did not remedy that violation. Appendix I, at 43-45. Justice Tomljanovich would have remanded the case for a new trial. Appendix I, at 47.

VI.

REASONS FOR GRANTING THE WRIT

A. THIS CASE RAISES THE IMPORTANT ISSUE OF WHETHER THE CONFRONTATION CLAUSE REQUIRES UNAVAILABILITY OF A WITNESS AS A PREREQUISITE TO THE ADMISSION OF OUT-OF-COURT STATEMENTS UNDER THE RESIDUAL EXCEPTION TO THE HEARSAY RULE, A SLIGHTLY DIFFERENT ISSUE THAN RAISED IN WHITE V. ILLINOIS WHICH IS NOW PENDING BEFORE THIS COURT

Interpreting Inadi as limiting the "general rule" in Roberts to cases of former testimony and ignoring the language of Idaho v. Wright on unavailability, the

Minnesota Supreme Court reiterated its holding that "unavailability" is not constitutionally required by the Confrontation Clause as a prerequisite for admission of out-of-court statements under the residual exception to the hearsay rule. Appendix I, at 10 n.1; See also Appendix A. 11-15.[3] This holding is inconsistent with this Court's decisions and violates the principles of the constitutionally guaranteed right of confrontation. This Court should review petitioner's case to definitively resolve the conflict lower courts have found between its decisions in

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[3] In its order denying the petition for rehearing in Larson I, the court added one word to its previously released opinion: ". . . (T)he United States Supreme Court made it clear in Inadi that the unavailability of the declarant is not always prerequisite to admissibility of hearsay evidence against the declarant in a criminal trial." (emphasis supplied to note added word)453 N.W2d at 46; Appendix A. 15.

Roberts and Inadi.

Since remanding petitioner's case for further consideration in light of Idaho v. Wright in October, 1990, this Court has granted certiorari in White v. Illinois, 198 Ill. App. 3d 781, 555 NE2d 1241, leave to appeal denied 133 Ill. 2d 570, 561 NE2d 705 (1990), cert. granted 111 S. Ct. 1681 (1991), a case which raises the same important issue, although in a slightly broader fashion,[4] as that submitted to the Court in this petition, (as well as in the previous petition): does the Confrontation Clause require a showing of unavailability

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[4] The decision of the appellate court in White held that unavailability of the declarant "is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception . . . to the hearsay rule." Id. at 1252. In this case, the issue involves the requirement of availability of a declarant whose out-of-court statements do not fit any of the traditional exceptions to the hearsay rule.

of a declarant whose out-of-court statements are admitted under the residual exception to the hearsay rule?

Upon the remand to state court, petitioner again sought to persuade the court that the Confrontation Clause required a showing of unavailability under the circumstances of this case by using this Court's analysis in Idaho v. Wright, (reaffirming that Ohio v. Roberts stated the general rule requiring unavailability and indicating its continuing vitality) and other decisions of this Court.[5]

Despite acknowledging that this Court

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[5] See Bourjaily v. United States, 483 U.S. 171, 172 (1987)(citation of the "general approach"); Lee v. Illinois, 476 U.S. 530, 549 n.2 (1986)(Blackmun, J., dissenting)(appropriate test compares particular hearsay with former testimony and co-conspirator statements to determine applicability of unavailability requirement--custodial confession like former testimony, unavailability required).

would probably address this issue in White v. Illinois,[6] the state court in a lengthy footnote merely reiterated its earlier view, again holding that United States v. Inadi provided a constitutional basis to depart from the requirement of unavailability in this case, citing the views of several commentators to support this interpretation of Inadi. Appendix I, at 13-15 n.1; See also Appendix A, 12-3, 15.

This case presents the important issues of whether unavailability of a witness is generally required as a prerequisite to admission of out-of-court statements, and whether unavailability is required in the particular situation of

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[6] The opinion of the Minnesota Supreme Court miscited the lower court decision in that case. The correct citation is "555 N.E.2d 1241."

out-of-court statements which do not meet any of the traditional hearsay exceptions.

This case presents an opportunity for this Court to resolve any misinterpretatio of, or conflict between, its decisions in Ohio v. Roberts and United States v. Inadi to answer the questions which were not raised or answered to the satisfaction of lower courts in Idaho v. Wright, and to determine the applicability of the constitutional requirement of unavailability in the narrow context of hearsay admitted under the residual exception to the hearsay rule.

The constitutional ramifications of a decision on unavailability (procedural) have even broader applications than those surrounding reliability (factual) questions. A wholesale departure from existing practice is made by the holding

that unavailability is no longer required for admission of hearsay statements under the residual exception. As will be discussed later, see 27-35 infra, the application of this new ruling is indeed great and far reaching.

This Court should grant the petition for a writ certiorari to decide this significant issue, an issue which apparently has left other courts (and commentators) throughout the country confused about the requirements of the Confrontation Clause. This Court has already recognized the importance of this issue. White v. Illinois, supra. Petitioner's case would help to identify the concerns raised by this issue and to resolve them.

B. THIS CASE ALSO RAISES THE ISSUE OF WHETHER THE ACCUSED CAN BE FORCED TO CALL A WITNESS WHOSE OUT-OF-COURT STATEMENTS HAVE BEEN ADMITTED IN ORDER TO EXERCISE HIS CONSTITUTIONAL RIGHT TO CROSS-EXAMINATION, AN IMPORTANT ISSUE WHICH IS BEYOND THE SCOPE OF WHITE V. ILLINOIS, AND AN ISSUE WHICH IS LIKELY TO RECUR UNTIL DECIDED BY THIS COURT

Though deciding that unavailability was not constitutionally required, the Minnesota Supreme Court also held that, for constitutional confrontation purposes, a witness was "available" as long as the accused was able to call this person to testify at trial. Appendix I at 15 n.1; See also Appendix A, 14-15. The court also fashioned a prospective evidentiary rule requiring the state to call as a witness during its case-in-chief, a declarant whose out-of-court statements are admitted at trial if expressly requested to do so by the accused. Appendix I, at 15-6 n.1; See

also Appendix A, 23-24.

These rulings raise important questions which have not been answered by this Court and which do not appear to be before the Court in the case of White v. Illinois, supra. This case will assist the Court to identify and resolve the constitutional concerns beyond White. The decision on these issues is clearly one which this Court should decide. These issues are likely to recur until this Court does so.

Definition of availability. Even though the decision of the Minnesota Supreme Court rejected the requirement of unavailability in this case, it went on to define "availability" in constitutional terms that this Court has yet to set forth: the declarant whose out-of-court statements

were admitted was "available" because the accused could call her as a witness at trial. Appendix I, at 15-6 n.1; See also Appendix A, 14-15. The state court emphasized that since petitioner could hav called the witness at trial if he wished t confront her, but chose not to do so, this demonstrated that there was no constitutional violation in petitioner's case. Id.

The state court, picking language out of context from this Court's decision in Inadi, held that petitioner's ability to call the declarant as a witness at trial and cross-examine her satisfied any constitutional claim. Appendix I, at 11-12 n.1; See also Appendix A, 14-5.

The Minnesota Supreme Court took very narrow, fact specific language in Inadi, expanded upon it, and applied it to a

completely different situation. This Court did not hold that the defendant's ability to call a witness satisfies all constitutional claims. Inadi only held that the benefits of requiring unavailability, under the facts of that case, did not outweigh the substantial burdens that it would impose. The ability of the defendant to call a witness was only one of the many factors considered by this Court in reaching that conclusion. United States v. Inadi, 475 U.S. 387, 394-400 (1986).

The Minnesota court's overbroad interpretation of Inadi establishes a dangerous precedent which, if not corrected, sounds the death knell for the right of confrontation in criminal cases.

The decision completely circumvents the constitutional requirement of

unavailability in only one case--petitioner's case. See 28-29, infra. In other, future cases, it replaces the constitutional requirement with a prospective evidentiary rule that requires the accused to demand that the state call a specific witness at trial. If unavailability is not constitutionally required, then of course, Minnesota's rule is not constitutionally required. Other states would be able to follow the Minnesota decision on availability without adding the evidentiary rule. Minnesota could also change or abandon this rule in the future.

This decision in a child sex prosecution may be applied to many other types of prosecutions and evidentiary situations. Courts in Minnesota and elsewhere would be free to decide that the

Confrontation Clause does not require adult victims of rape, elderly victims of any crime, or any reluctant witnesses to testify, and allow the state to prosecute simply on the basis of out-of-court statements to police and others admissible under the residual exception because they are "reliable."

Many, if not most, prosecutions rely on victim/witness testimony. If the ruling of the Minnesota Supreme Court is allowed to stand, the most fundamental rule of law and our criminal justice system, the right of the defendant to confront his accusers, will become meaningless. The critical significance of the court's decision sounded by the dissenting justice in Larson I is worth repeating here:

> I would hold that if the state wishes to establish the crime by victim testimony, which is almost always the case in this type of

> prosecution, it must do so by producing the alleged victim on the witness stand in open court so the accused may be afforded his constitutional right of confrontation. 453 N.W.2d at 48; Appendix A 27.

The far reaching application of the court's ruling, to virtually any and all prosecutions involving victim/witness testimony, demonstrates the many situations in which the issue is likely to recur unless this Court decides this question. In addition, since the statements were admitted under the residual exception to the hearsay rule, and not a unique Minnesota law, the decision could be adopted by any of the many states whose rules of evidence, like Minnesota's, are based on the uniform rules.

Prospective rule: Defendant demands that witness be called by the state. The Minnesota court, however, seemed to sense

constitutional problems with its reasoning that the accused must call an "available" witness in order to cross-examine the witness. To remedy these problems, the court then fashioned a prospective evidentiary rule: the state must call as a witness a declarant whose out-of-court statements have been admitted if expressly requested by the accused. Appendix I at 15 n.1; See also Appendix A at 23-4.

The state court, however, failed to address the clear constitutional violations presented by its ruling in petitioner's case, suggesting he should have anticipated its unusual if not unprecedented criminal ruling and asked the prosecutor to call the witness or call her himself. Appendix I, at 16 n.1. More importantly though, even the court's prospective evidentiary rule raises significant constitutional issues which

neither this Court nor the state court have addressed.

The state court's reasoning is constitutionally flawed because it focuses on what a defendant can do to obtain his right of confrontation instead of focusing on how the state is required to meet its burden of proof in a criminal case. The real question is the propriety of allowing the state to meet its burden of proof by out-of-court statements, even ones not meeting any of the tradition exceptions to the hearsay rule, without calling an available declarant. The state court's evidentiary rule unconstitutionally shifts the burden to the defendant, by forcing him to call the witness or to expressly demand the state to call the witness.

The prospective rule (and the rule in petitioner's case) deprive the accused of

the fundamental constitutional rights to have the state present witnesses against him, to be presumed innocent, and to have no burden of proof whatsoever.

The state court ruling confuses the protection of the compulsory process clause, (which gives the accused the right to compel trial attendance of witnesses in his favor), with confrontation and cross-examination. The former does not allow the state to abdicate its burden of proof and/or justify its shift to the defendant.

These questions are clearly very important constitutional questions which this Court, not the lower courts of this country, should decide. These questions are ones which will keep recurring until decided by this Court. This Court should provide the lower courts with guidance by enunciating what the constitutional

definition of "availabile" is for admission of out-of-court statements under the catch-all residual exception to the hearsay rule and how it can be satisfied.

This case presents this Court with the opportunity to resolve a number of issues in what has been a highly litigated area in recent years. In addition to the number of situations in which out-of-court statements are being offered at trial, state legislatures are continually passing new laws attempting to make out-of-court statements admissible in even more situations. This pattern can be expected to continue until this Court steps in and again clarifies the law on these issues.

These issues also raise questions about the fairness of a procedure which allows the state to present its case on the basis of out-of-court statements, without

the declarant appearing, testifying, and being cross-examined before the jury. Where the accused is facing a 10 or 20 year prison term--or longer, and the witness is available, it is not at all clear what state interest outweighs the right to confrontation. Discarding the fundamental requirement of unavailability abrogates the fundamental protection and significance of the right to confrontation.

Petitioner's case presents this Court with the opportunity to clarify the protection of the Confrontation Clause as applied in a typical criminal prosecution, to go beyond the decision in White v. Illinois, and to reaffirm the fundamental principles of confrontation in the face of ever narrowing interpretation by state courts and legislatures.

C. IN THE ALTERNATIVE, THIS COURT SHOULD STAY ACTION ON THIS PETITION PENDING ITS DECISION IN WHITE V. ILLINOIS AND REMAND PETITIONER'S CASE FOR APPLICATION OF THE RULING IN WHITE TO HIS CASE

The Minnesota Supreme Court reiterated its rulings--(that unavailability was not constitutionally required and even if it was there was no error because petitioner could have called the witness at trial to confront her)--despite acknowledging that this Court had granted certiorari in White v. Illinois, a case raising constitutional questions on the requirement of unavailability. If this Court chooses not to grant this petition now, it is respectfully requested that this Court stay a decision in this case until after deciding White v. Illinois. The Court could then, if appropriate, grant this petition and review this case, or vacate

the judgment, and remand for further consideration in light of the decision in White.

In July, 1990, petitioner sought review of the earlier decision of the Minnesota Supreme Court (Larson I) by this Court and raised very similar issues to those now before this Court in White v. Illinois, supra. Upon remand from this Court, petitioner again sought to persuade the state court that the decisions of this Court indicated that the Confrontation Clause did require a showing of unavailability as a prerequisite for the admissibility in this case where the numerous out-of-court statements did not meet any of the traditional hearsay exceptions.[7] The Minnesota court in a

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[7] Petitioner advised the state court that this Court had granted certiorari in White on May 2, 1991, attaching a copy of

lengthy footnote acknowledged that this issue was before this Court but nonetheles reiterated its reasoning that unavailability was not constitutionally required.

Petitioner has been vigilant in preserving the important constitutional issues raised by his case on appeal. Even if this Court might not be inclined to grant the Petition for Writ of Certiorari for some reason, petitioner respectfully requests that the Court stay action on the petition until after its decision in White v. Illinois, supra, so that it can then decide whether this petition should be granted for review or whether petitioner is entitled to relief under this Court's ruling in White. It is expected that this Court's ruling in White will clarify the

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the lower court decision to the letter.

confusion some courts have found surrounding the Confrontation Clause's unavailability requirements. Despite the narrower issue involving the unavailability requirement (residual exception to the hearsay rule) and the broader issue of the constitutionally required definition of "available," application of this Court's ruling and analysis in White may be sufficient to allow determination of the issues presented in petitioner's case.

VII.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Minnesota Supreme Court in this matter.

Respectfully submitted,

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STATE OF MINNESOTA
IN SUPREME COURT
C2-88-2379

On Remand By United States Supreme Court — Coyne, J. Dissenting, Tomljanovich, J.

State of Minnesota,

Respondent,

vs.

Filed July 12, 1991
Office of Appellate Courts

Bruce Philip Larson, petitioner,
Appellant.

S Y L L A B U S

Under Idaho v. Wright, 110 S. Ct. 3139 (1990), trial court did not violate defendant's right of confrontation in admitting extrajudicial statements made by a child to assistant to doctor to whom child was taken for treatment of symptoms, to child protection specialist, or to clinical psychologist during weekly therapy sessions; defendant received a fair trial and was properly found guilty of criminal sexual conduct in the second degree.

Affirmed.

Heard, considered and decided by the court en banc.

O P I N I O N

COYNE, Justice.

In State v. Larson, 453 N.W.2d 42 (Minn. 1990), we affirmed the child sex abuse conviction of the defendant against a number of contentions, including the contention that extrajudicial statements by the complainant were improperly admitted against the defendant in violation of his right of confrontation. We decided Larson on March 23, 1990, and denied defendant's petition for rehearing on May 15, 1990. Subsequently, on June 27, 1990, the United States Supreme Court filed its opinion in Idaho v. Wright, 110 S. Ct. 3139 (1990). Then on October 1, 1990, the United States Supreme Court granted defendant's petition for a writ of certiorari, vacated the

judgment of this court and remanded the case to this court for "further consideration in light of" the Wright case. Larson v. Minnesota, 111 S. Ct. 29 (1990). The parties thereafter filed further briefs and oral argument was held. After careful reconsideration of the case in light of Wright, we reaffirm the judgment of conviction.

In late April of 1987 complainant, B., not quite 4 years old, complained to her mother of vaginal soreness and burning urination. On May 1, B.'s mother, who had custody of the child subject to defendant father's visitation privileges, took her to a family practice clinic for diagnosis and treatment. The physician's assistant, who conducted the examination, saw redness and swelling around the vaginal opening. Suspecting abuse, the examiner, after

assuring B. that she was there to "assist her," asked B. if anyone other than her mother or herself had touched her vaginal area. B. initially responded "no" and turned away. When the examiner repeated the question, B. said "yes," that "Daddy" had touched her there. When the examiner asked whether her daddy had touched her there to help wipe her or dry her, B. said "yes," but then, when asked "where," pointed to her abdomen. When asked with what he had touched her, B. replied that "Daddy" had touched her "between [the] legs" with "his bone" that "came out of his pants." Asked whether this had happened before, B. said "yes," that "he laid me on the couch and he rubbed my belly * * * until my skin came off." B. further stated that it hurt "because he pressed hard against her tummy and hugged her real

hard," and that she had asked him to stop. She further described feeling wet on her abdomen and having to wipe herself dry afterwards. Although B. apparently told her mother when the examiner briefly left the room that she was "only kidding," B. immediately recanted this to the examiner and explained that "she didn't want to have her father in trouble." Indeed, the examiner observed that B. was "very nervous and very protective of her father," whom B. "obviously loved."

Visits were temporarily discontinued pursuant to a court order obtained on May 2 in the district court in the county where defendant resides.

On May 7, B. made equally damaging statements to a child protection specialist.

Defendant retained an attorney and

obtained a court order in June allowing supervised visits.

A doctor who talked with B. four times as part of a psychological evaluation concluded that there was a "high probability" that she had been involved in "inappropriate sexual activity."

Nonetheless, on July 31, 1987, the court ordered reinstatement of defendant's unsupervised visitation privileges.

In August B. began weekly psychotherapy with Dr. Susan Lund, a clinical psychologist specializing in the treatment of abused children who is employed at Midwest Children's Resources Center. These one hour long weekly sessions, conducted largely outside the mother's presence, were for the purpose of therapy, not substantiating the existence of abuse. During a session held on October

22, 1987, B., prompted by Dr. Lund's questions about B.'s trouble with waking and with nightmares, particularly at defendant's house, said that defendant "pushed at her with his penis and wiggled his penis on her." Using anatomically correct dolls, B. demonstrated by pushing the father doll's penis "at her [doll's] vaginal area" and "wiggl[ing] his penis horizontally across the clitoris." B. said that this "felt warm and nice." She said it happened during the recently reinstated unsupervised visits.

Hennepin County, the county of the mother's residence, obtained an order assuming custody of both B. and her younger brother and terminating defendant's visitation privileges. A social worker and a police officer interviewed B. in November. The prosecution was commenced in

December of 1987 in Martin County where the abuse occurred.

The pre-trial suppression hearing was held in June of 1988 shortly before trial was to commence. That hearing was held on the state's motion for permission to use the extrajudicial statements of B. and on defendant's motion to suppress the statements on the ground that admitting them would violate defendant's right of confrontation. For purposes of the suppression hearing the parties stipulated that B., then 5, was incompetent to testify. The trial court rejected defendant's arguments in favor of suppression and ruled that the statements were admissible under Minn. Stat. § 595.02, subd. 3 (1988). Afterward, the trial court granted the defense a continuance so that the defense could try to obtain expert

testimony and also so the defense could decide whether to call B. to testify.

At the reconvened suppression hearing in August, shortly before the rescheduled trial date, defendant renewed his suppression motion, relying on Coy v. Iowa, 487 U.S. 1012 (1988). The trial court ruled that Coy did not apply.

On the first day of trial defendant made a continuing objection to the statements on the ground that their admission would violate his right of confrontation. Defendant also said he intended to call B. as a witness. The trial court therefore conducted an in-chambers competency hearing and determined that B. was competent, thereby enabling defendant to call B. as a witness if he wished. Defendant, however, decided not to call B. as a witness.

In our earlier decision we held, inter alia[1] that the statements were admissible

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[1]In Ohio v. Roberts, 448 U.S. 56, 65 (1980), the Court set forth a "general approach" for determining when incriminating hearsay statements admissible under an exception to the hearsay rule satisfy the requirements of the Confrontation Clause. Under the general approach the prosecution "must either produce, or demonstrate the unavailability of, the declarant", 448 U.S. at 65, and must demonstrate that the declarant's statement bears adequate "indicia of reliability," 448 U.S. at 66. However, as we said in Larson I, the Court in United States v. Inadi, 475 U.S. 387, 394 (1986), made it clear that "the unavailability of the declarant is not always prerequisite to admissibility of hearsay evidence against the defendant in a criminal case." 453 N.W.2d at 46. In Inadi the Court made an exception to the general unavailability requirements in a case involving admission of statements by nontestifying but available to co-conspirators of the defendant. The Court said that the unavailability rule was developed in cases involving admission of former testimony, where there is good reason for a rule of preference for the live testimony unless the witness is shown to be unavailable, specifically, "former testimony often is only a weaker substitute for live testimony [and] seldom has independent evidentiary significance of its own." 475 U.S. at 394. The same logic does not apply equally to

those extrajudicial statements which derive much of their significance from the context in which they are made, a context very different from trial. Id. at 395-96. The Court rejected an unavailability requirement in the Inadi context because it would impose a significant practical burden on the prosecution to insure the availability of declarants even where it was clear neither the prosecutor nor the defense wishes to examine the declarants at trial. As the Court put it:

> Any marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarants who are available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarants, cannot support an unavailability rule. We hold today that the Confrontation Clause does not embody such a rule.

Inadi, 475 U.S. at 399-400.

We concluded that the same reasoning applied in this case. As we put it:

> As in Inadi, it is not at all clear that it was in the interests of the defendant that the declarant be called by either

> side. It may well have been better for the defendant to go to the jury and challenge the ambiguity of the child's statements (when she said that the abuse occurred in defendant's house but would not say who did it) than to have the child called and possibly testify in court that it was defendant who did it.

Larson I, 453 N.W.2d at 45-46.

Given the circumstances of the case--including the fact that the statements in question had independent evidentiary significance, the fact that the trial court had conducted a competency hearing and found B. to be competent after the defense expressed a desire to confront the child and cross-examine her, and the fact that the defense, after apparently considering the matter carefully, demonstrated that it did not wish to call B. --we concluded that the Inadi reasoning made equal sense in this context. Id. at 46.

However, because we recognized "that a defendant who wants to cross-examine an available child witness whose extrajudicial statements are being sued by the state should not be compelled to call the child as a witness if the defendant would prefer that the state call the witness," we prospectively adopted a modified version of the approach suggested by Professor Westen and held that "in future cases of this kind

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the state must, when expressly requested by the defendant to do so, call in its case-in-chief an available witness whose hearsay statements are being admitted against the defendant." Id. at 47 (emphasis in original), citing Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 617-18 (1978).

The interpretation of Roberts and Inadi by the dissenting justice, who was not a member of this court when we filed our earlier opinion, is at odds with that advanced by leading commentators. For example, Professor Haddad, in his analysis of these cases, concludes, contrary to the conclusion of the dissent, that the Supreme Court "has rejected the principle that prefers live testimony over hearsay when the hearsay declarant is available at the time of trial." J. Haddad, The Future of Confrontation Clause Developments, 81 J.Crim. L. & Criminology 77, 80-81 (1990). As Professor Haddad puts it, "After seemingly accepting" a rule of preference in Roberts, "the Supreme Court in Inadi held that the rule of preference applies only in a narrow class of cases." Id. at 81. He goes further and suggests that "[t]he former testimony exception will likely stand practically alone as to the requirements that the prosecution demonstrate the hearsay declarant's unavailability." Id. at 82.

Professor Michael Graham, in a

perceptive article analyzing Roberts and Inadi, concludes that "Inadi supports the introduction of any available declarant's statement simply because of the defendant's ability to subpoena and examine the declarant as to the subject matter of the statement at trial." M. Graham, The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 Minn. L. Rev. 523, 587 (1988). Professor Graham argues, however, for a rule requiring the prosecutor offering an out-of-court statement under either a hearsay exemption or exception to produce an available witness "if the circumstances surrounding the making of the statement indicate that it was accusatory when made." Id. at 593. In fact, our earlier decision in this case went farther than this and adopted a prospective rule as a matter of state evidentiary law rather than as a matter of constitutional law, requiring the prosecutor, when expressly requested by the defendant to do so, to call in the state's case-in-chief an available witness whose hearsay statements are being admitted against the defendant. Larson I, 453 N.W.2d at 47.

As noted by the editors of the Harvard Law Review, Wright focused on the issue of reliability, not on whether a showing of unavailability is a prerequisite to admission of a child's hearsay statements. Note, 104 Harv. L. Rev. 129, 130-31, 138 (1990). Although they argue in favor of a

narrowly-defined unavailability requirement in this context, they conclude that it is "unclear" from the several confrontation clause decisions of the Supreme Court whether a showing of unavailability is required. Id. at 138, n.77. Indeed, the Court in Wright expressly said that it was not addressing the question. Wright, 110 S. Ct. at 3147. And since the Court declined to address the issue in Wright, it can hardly be said to have altered its position by the Wright decision. (It appears that the Court will address the question in White v. Illinois, 198 Ill.App.3d 781, 556 N.E.2d 555, leave to appeal denied, 133 Ill.2d 570, 561 N.E.2d 705 (1990), cert. granted, 111 S. Ct. 1681 (1991).

In any event, as we have said, our earlier decision in this case answered the concerns of those thoughtful analysts of the confrontation clause who have argued that if a witness is "available," the prosecutor should have to produce the witness so that the defendant does not have to call the witness in order to confront and cross-examine the witness. We did this by requiring, prospectively, as a matter of state evidentiary law that when the defendant so requests, the prosecutor must call in the state's case-in-chief an available witness whose hearsay statements are being admitted against the defendant. Interestingly, the Eighth Circuit in United States v. Massa, 740 F.2d 629, 640 n.6 (8th Cir. 1984), cert. denied, 471 U.S. 1115

under Minn. R. Evid. 803(24) (the residual exception) and Minn. R. Evid. 803(4) (statements for purpose of medical diagnosis or treatment) and that the statements were sufficiently reliable to satisfy the confrontation clause. But, since our decision preceded the United States Supreme Court's decision in Wright, we did not have the benefit of the Wright analysis, an analysis on which we relied in upholding the admission of extrajudicial

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(1985), concluded that Roberts does not require as much. It concluded that at most Roberts places a burden on the government to make a good faith effort to obtain the presence at trial of any witness whose out-of-court statements it is using against the defendant and that if the government obtains the declarant's presence at trial, "it need not call the witness to testify." Id. Whether or not the Eighth Circuit's analysis in Massa is correct really does not matter in this case, because, as we said, the defense not only did not ask the prosecutor to call the witness but, after apparently considering the matter carefully, made it clear that it did not wish to confront and cross-examine her.

statements of a child sex abuse victim in State v. Lanam, 459 N.W.2d 656 (Minn. 1990), cert. denied, 111 S. Ct. 693 (1991).

In Wright there were two girls involved, one 5½ and the other 2½ years old. The older girl told her father's female companion, Goodman, that her mother's boyfriend, Giles, had had sexual intercourse with her while her mother covered her mouth and held her down. She said she had seen them do the same thing to her younger sister. Goodman reported the matter to the police and took the older daughter to the hospital, where a medical examination revealed evidence of sexual abuse. Police and welfare officials then took the younger daughter into custody. The same doctor who had examined the older daughter examined the younger daughter.

The main issue in Wright, for our

purposes, was whether the admission at trial under the Idaho residual exception to the hearsay rule of statements made by the younger girl to the doctor violated the mother's right of confrontation. The Court reaffirmed that the "indicia of reliability" requirement of Ohio v. Roberts, 448 U.S. 56 (1980), generally can be met by either of two ways: by demonstrating that the extrajudicial statement "falls within a firmly rooted hearsay exception," or by showing that the statement has "particular guarantees of trust-worthiness." Wright, 110 S. Ct. at 3147. The Court cited the "excited utterance," "dying declaration" and "medical treatment" exceptions to the hearsay rule as firmly-rooted hearsay exceptions, but concluded that the so-called residual hearsay exception,

illustrated by Minn. R. Evid. 803(24), is not firmly rooted for confrontation clause purposes. Id. at 3147-49. Since the state in Wright conceded that the younger daughter's statements did not fall within a firmly-rooted exception, the Court proceeded to analyze whether the statements possessed "particular guarantees of trustworthiness." Id. at 3148. The Court said that trustworthiness guarantees must be shown from the totality of the circumstances that surround the actual making of the statement, not evidence corroborating the statement. Id. at 3148-49. As we said in Lanam in our summary of Wright:

> "[T]he focus is not on all the circumstances, including evidence at trial corroborating the child's statements, but only on those circumstances actually surrounding the making of the statements. These circumstances include, but are not limited to,

> whether the statements were spontaneous, whether the person talking with the child had a preconceived idea of what the child should say, whether the statements were in response to leading or suggestive questions, whether the child had any apparent motive to fabricate, and whether the statements are the type of statements one would expect a child of that age to fabricate.

459 N.W.2d at 661 (citing Wright, 110 S. Ct. at 3149-52). Other circumstances identified by the Court in Wright include the "mental state" of the child at the time the statements were made and the "consistent repetition" of the child's statements during the same interview or conversation. 110 S. Ct. at 3150. In addition to considering whether the child had an apparent motive to fabricate, it would seem that the Court could consider whether the child had an apparent motive to speak truthfully. State v. Conklin, 444

N.W.2d 268, 276 (Minn. 1989)(case preceding Wright).

Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis of Treatment, 67 N.C.L. Rev. 257 (1989), cited in Wright, 110 S. Ct. at 3149, points out that the federal rule corresponding to Minn. R. Evid. 803(4) (statements for purpose of medical diagnosis or treatment) is broader than the traditional or long-standing "medical treatment" exception and suggests that possibly only statements covered by the "core" part of Rule 803(4) are admissible without a showing of particularized guarantees of trustworthiness. We believe that the key hearsay evidence in this case, B.'s statements to the medical assistant, falls within the "core" part of Rule 803(4) and should be admissible without any

additional showing of particular guarantees of trustworthiness. However, we need not decide the point because we are convinced, after considering the factors surrounding B.'s making of the statements to the assistant, that the statements possessed particular guarantees of trustworthiness.[2]

One key factor is that, unlike the declarant in Wright, there is nothing to indicate that B. was taken to the family

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[2]We disagree with any suggestion that the case should be remanded to the trial court so that the trial court in the first instance may analyze the case in terms of the Wright factors. The "heart of the matter of determining whether to admit hearsay is that unreliable evidence should be kept from the jury," which is a "legal determination * * *." State v. Dana, 422 N.W.2d 246, 249 (Minn. 1988). "Of course, if there is a question of fact relating to the admission of hearsay evidence," then "the trial court will often receive evidence pro and con on the issue." Id. Because there are no significant disputed factual issues relating to the circumstances surrounding the making of the statements in question, there is no need to remand to the trial court.

practice clinic for any purpose other than to have a doctor examine her and determine the reason for the vaginal soreness and burning urination she was experiencing. B. knew she was being examined in a doctor's office and had the same "selfish" treatment-related motive[3] to speak the truth that anyone has when one goes to a doctor's office sincerely inquiring about one or more symptoms. Second, before beginning the exam the physician's assistant had no preconceived notion that abuse had occurred or that defendant had committed the abuse. Third, on examination the assistant, a person of both experience and presumed integrity, apparently immediately suspected abuse. Fourth, the

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[3]See Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C.L. Rev. 257,260-61 (1989).

questions the assistant asked were not the kind of questions that would prompt a child to fabricate the response the questions elicited, including B.'s statement that "Daddy" had touched her "between the legs" with his "bone" that "came out of his pants." Fifth, the story B. told had an immediately apparent "ring of credibility" to it and was not the sort of story that a child of that age would be expected to fabricate. Sixth, B. had no apparent motive to fabricate the claim of abuse. Indeed, just the opposite, she made it clear that she did not want to hurt defendant. Seventh, the assistant who as we said before is a person of experience and presumed integrity, obviously believed the child.

Of B.'s statements, those made to the physician's assistant clearly were key.

B.'s subsequent statements were largely cumulative evidence, evidence which at a minimum was admissible for the non-hearsay purpose of showing that B. was consistent in her allegations of abuse by defendant. See Minn. R. Evid. 801(c) (defining "hearsay" as a statement, other than one made by the declarant while testifying at the trial or hearing, "offered in evidence to prove the truth of the matter asserted"). Although we conclude that any error in admitting the subsequent other statements as substantive evidence of guilty was harmless beyond a reasonable doubt, we nonetheless have analyzed the admission of these statements under Wright.

Of B.'s other statements, those made to the child protection specialist on May 7, to Dr. Lund during therapy, and to the social worker and the police officer on

November 24 -- the least troubling, of course, are the ones made to Dr. Lund during therapy. Those statements were for the purpose of therapy, not the purpose of substantiating the existence of abuse, and were admissible under the "medical treatment" exception, Rule 803(4), which is firmly-rooted hearsay exception. However, even if the statements were not admissible pursuant to a firmly-rooted hearsay exception, there were "particular guarantees of trustworthiness" sufficient to satisfy the Wright confrontation clause analysis. On October 22, 1987, Dr. Lund was questioning B. about B.'s trouble with waking and with nightmares, particularly at defendant's house, when B. said that defendant "pushed at her with his penis and wiggled his penis at her." B., of course, had a "selfish" treatment-related motive

for being truthful with Dr. Lund since the purpose of the weekly sessions, of which B. was obviously aware, was to provide therapy for B. Moreover, there is nothing in the record to indicate that Dr. Lund used leading or suggestive questions. Indeed, the weekly sessions began in August and it was not until October 22 that Dr. Lund, using nonleading questions during the discussion of nightmares, elicited the statements. B.'s "acting out" of rescue themes, e.g., adult female dolls rescuing trapped child dolls, immediately following her revelations further enhances the reliability of the statements, as does the fact that B.'s behavior at the time she made the statements was, in the doctor's considerable experience, consistent with that of sexually abused children of that age. In addition, B.'s statements and her

demonstration of the sexual abuse using the dolls were certainly not what one would expect from a child of B.'s age who had not been sexually abused. State v. Sorenson, 143 Wis.2d 226, 246, 421 N.W.2d 77, 86 (1986), the case cited in Wright for this factor, expressly noted the reliability engendered by a child's crude depiction of sexual abuse with anatomically correct dolls and a child's description of wiping herself off. Here, B. used the dolls to demonstrate in detail the positions and movements of defendant and herself during the alleged abuse.

The case is almost as strong for the admission of B.'s statements to the child protection specialist on May 7. The child protection specialist testified as to her awareness of the problem of using leading questions with children and there is no

indication that she used leading or suggestive questions. B. said that "someone" had put his penis "between her legs and up her butt." She used anatomically correct dolls to demonstrate the abuse, showing herself on her back and her abuser "on top of her, face-to-face." B. would not say who that "someone" was because "she loved her Daddy and she didn't want him to get into trouble." But she said the abuse happened on the living room couch "in her Daddy's house." Later, while crying quite heavily, she volunteered that even though "her Daddy had promised it would never happen again and he was sorry," the abuse had re-occurred. In concluding that B.'s statements to the child protection specialist were admissible under the Wright analysis, we rely on some of the factors that we cited in our analysis of

the statements to the medical assistant during the initial examination and the statements to the clinical psychologist during the weekly therapy sessions: nonleading questions were asked; the child seemed not motivated to "get" defendant but rather to protect him; the conduct described and demonstrated was not the kind of conduct a child that age would normally be able to describe and demonstrate unless the child had been the victim of sexual abuse. We also note that B.'s emotional state ("crying hysterically") upon making the allegations to the child protection specialist reinforces our conclusion that the statements were sufficiently reliable for confrontation clause purposes.

While we cannot say that B.'s statements to the social worker on November 24 were unreliable, because some of the

factors indicating reliability were present, we are nevertheless reluctant to conclude that the statements made on that day were sufficiently reliable to satisfy the Wright test. The initial questions by the police officer, who was present and participated in the interview, were leading questions that began with the premise that "Daddy hurt" B. The questions asked by the participants were often repetitive and leading, B.'s responses were not particularly spontaneous, and B.'s emotional state appeared almost completely unaffected by her revelations at that time. Because of these factors as well as the documented dangers[4] of the "tag team" approach to interviewing children and the repeated questioning of children and

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[4] See Minnesota Attorney General's Report on Scott County Investigation, February 12, 1985.

because of the ambiguity of B.'s responses, the circumstances do not sufficiently establish the reliability of these particular statements under Wright. However, any error in admitting the statements made on November 24 clearly was harmless error beyond reasonable doubt.

We conclude that all of the extrajudicial statements except those statements made on November 24 were properly admitted under the Wright analysis, and we are satisfied that defendant received a fair trial and was properly convicted of the offense in question. We therefore reaffirm the judgment of conviction.

Affirmed.

TOMLJANOVICH, Justice (dissenting).

I do not agree that the confrontation clause of the sixth amendment permits the state to substitute hearsay for the in-court testimony of an available witness in the particular circumstances presented by this case.

In Ohio v. Roberts, 448 U.S. 56 (1980), the United States Supreme Court articulated a general approach for resolving the conflict between the confrontation clause, guaranteeing an accused person the right to be confronted with witnesses against her or him, and the numerous exceptions to the hearsay rule, permitting out-of-court statements to be offered at trial in place of live testimony. The Court explained that, in order to conform with confrontation clause requirements, "[i]n the usual case

(including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Id. at 65 (citations omitted).

Once the state has met this generally applicable burden, it must then demonstrate the hearsay it wishes to introduce is adequately reliable. Id. at 65-66. The state may satisfy this second requirement by demonstrating that the hearsay bears particularized guarantees of trustworthiness or that the hearsay falls within the scope of a "firmly rooted hearsay exception." Id. at 66.[1]

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[1] "[C]ertain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" Roberts, 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)) (footnote

I agree with the majority that "Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." United States v. Inadi, 475 U.S. 387,394 (1986) (emphasis added). Indeed, Roberts itself expressly states such a disclaimer. See 448 U.S. at 65 n.7. ("A demonstration of unavailability, however, is not always required." Id.) Roberts clearly did not establish a rule requiring unavailability be demonstrated anytime the state wishes to introduce hearsay as a substitute for live testimony. Rather, it acknowledged that in most instances -- "in the usual case"-- the baseline requirements established by the confrontation clause will not permit

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omitted).

introduction of hearsay absent the demonstrated unavailability of the declarant.

However, I firmly disagree with the majority's suggestion that United States v. Inadi, 475 U.S. 387 (1986), worked any substantial change in the Roberts rule. In Inadi, 748 F.2d 812 (3d Cir. 1984), rev'd, 475 U.S. 387 (1986), the Third Circuit concluded that there was no reason to deviate from the unavailability requirement where the government sought to introduce hearsay statements of a nontestifying coconspirator. See id. at 818. Given the tremendous advantage such statements provided the government, the court reasoned, requiring the government to demonstrate that live testimony was not an option, owing to the declarant's unavailability, did not seem overly

burdensome. See id. at 818-19.

The Supreme Court disagreed. It first explained that Roberts should not be read without attention to its own factual setting -- that is, where "the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial." Inadi, 475 U.S. at 393. Because Roberts articulates a general, but not a necessary rule, it obviously cannot be extended to instances clearly distinguishable from the proffered introduction of prior hearing testimony to replace testimony in court.

The Court then went on to explain why the Third Circuit was incorrect in concluding that out-of-court coconspirator statements were not sufficiently dissimilar from testimony given in a previous judicial proceeding to justify relaxing the

unavailability requirement:

> There are good reasons why the unavailability rule, developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements. Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition [for coconspirator statements], former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. But if the declarant is unavailable, no "better" version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point.

Id. at 394-95 (citation omitted).

While clearly justifying application of the unavailability rule where the government seeks to introduce hearsay in the form of prior testimony, the Court concluded this rationale does not justify extending that rule to coconspirator statements. See id. at 395. Such statements, the Court reasoned, are independently valuable as evidence of the context in which the conspiracy existed and typically can not be replicated by in-court testimony. In part, this is because the coconspirator-declarant will have changed from the defendant's partner in a criminal enterprise to a suspect or co-defendant, with interests entirely adverse to those she or he had as part of the conspiracy. It therefore "is extremely unlikely that in-court testimony will recapture the

evidentiary significance of statements made when the conspiracy was operating in full force." Id.

The Court further noted the substantial practical burdens applying the unavailability rule to coconspirator statements would place on prosecutors, often requiring the government to transport incarcerated individuals to and from court, or to maintain constant information as to the whereabouts of unincarcerated suspects. See id. at 399. Particularly where the defendant's interests clearly would not be furthered by the opportunity to examine the declarant at trial, the imposition of such burdens can not be justified. See id.

Thus, the Court concluded, the same reasons that support requiring a demonstration of the declarant's unavailability prior to introducing hearsay

statements in the form of previous testimony do not justify extending that requirement to out-of-court statements made by a non-testifying coconspirator, in large part owing to the independent evidentiary value such statements bear, the marginal protection extending the requirement would provide a defendant who has little or no interest in examining the declarant at trial, and the substantial burdens the requirement would place on the government.

Taken together, Roberts and Inadi establish a general presumption in favor of live, in-court testimony, absent a showing of unavailability coupled with demonstrated reliability of the hearsay offered in substitution, and a set of reasons for departing from that presumption with respect to unavailability. I do not agree with the majority that any subsequent

Supreme Court decision, and particularly Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 3139 (1990), alters this arrangement.

In Wright, the Court unambiguously stated that it was "[a]pplying the Roberts approach * * *." Id. at ___, 110 S.Ct. at 3147 (emphasis added). Taking as given that the child-declarant was unavailable for Roberts purposes because she was determined to be incapable of communicating with the jury, the Court moved on to the second prong of the Roberts test -- whether the hearsay proffered by the state was sufficiently reliable to satisfy confrontation clause requirements. See id. I find it curious that the majority does not directly address this point in reviewing its earlier decision, on express instruction from the Court, "in light of Idaho v. Wright." It seems to me the

obvious implication of the post-Wright remand of Larson I is not that this court's conclusion as to the reliability of the proffered hearsay was flawed, but rather that its decision to circumvent the unavailability requirement was in error.

In my opinion, the state has not succeeded in demonstrating that the rationale underlying the Roberts rule fails to support application of that rule in this instance. Indeed, the factual setting here seems to track very closely the circumstances Inadi itself suggests justify excluding hearsay absent the declarant's demonstrated unavailability. The state is simply attempting to replace live, in-court testimony with something the defendant can not challenge in a situation where the replacement clearly is not the best evidence available.

Unlike the circumstances addressed in Inadi, the child-declarant here did not make out-of-court statements that are virtually irreplicable in court. Her circumstances and interests have not substantially changed so as to cast doubt on her willingness to testify truthfully. Finally, there is no particular burden placed upon the state in requiring that it call her as a witness, evidenced by the majority's "prospective evidentiary rule" permitting future defendants to demand such a declarant be produced.

Thus, the state has not met its burden of demonstrating both that the reasons underlying Roberts are inapplicable to the out-of-court statements at issue here and that the grounds for diverting from Roberts' general rule outweigh any benefit applying that rule might provide the

defendant. For this reason, the majority's "quick fix" evidentiary rule -- a prospective requirement that the state call the available declarant if requested to do so by the defendant -- is no solution. Roberts defines introduction of the hearsay at issue as a constitutional violation. Declaring a new rule of evidence that does not even apply to this defendant does nothing to remedy that violation.[2]

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[2] Because introduction of the hearsay at issue does not clear the baseline standard established by the confrontation clause, the majority's reliance on Minn. R. Evid. 803 (24), the "residual exception" to the hearsay prohibition, is misplaced. As the Supreme Court stated in Idaho v. Wright,

> Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibition with the general rule prohibiting the admission of hearsay statements. The

I would hold that in this particular instance, absent a demonstration that the child-declarant is unavailable to testify, the confrontation clause of the sixth amendment prohibits introducing that child-declarant's out-of-court statements to

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> Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.

___ U.S. at ___, 110 S.Ct. at 3146 (citations omitted).

Beyond the fact that satisfying an evidentiary rule does not automatically demonstrate constitutionality, I also disagree with the majority's conclusion that the child-declarant's statements are admissible pursuant to the residual exception. That exception requires a judicial determination that, among other things, "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts * * *." Minn. R. Evid. 803 (24) (B). Given the child-declarant's competence to testify, I do not believe the hearsay at issue is the most probative evidence the state may reasonably be asked to procure.

prove the truth of the facts they assert. This case should be remanded for a new trial.

STATE OF MINNESOTA

State of Minnesota,
Respondent,
vs.
Bruce Philip Larson,
petitioner,

Appellant.

X Supreme Court
Court of Appeals
JUDGMENT
C2-88-2379
Appellate Court
Case Number
K-87-1265
Trial Court Case
Number

Pursuant to an Order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court within and for the County of Martin be and the same hereby is affirmed and that the judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT August 19, 1991 Attest: Frederick K. Grittner Clerk of Appellate Courts By: /s/ D. Sobcinski Assistant Clerk

SUPREME COURT OF THE UNITED STATES

No. 90-168

Bruce Philip Larson,

Petitioner,

v.

Minnesota

ON WRIT OF CERTIORARI to the Supreme Court of Minnesota.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Supreme court of Minnesota for further consideration in light of Idaho v. Wright, 497 U.S. ___ (1990).

IT IS FURTHER ORDERED that the petitioner, Bruce Philip Larson, recover from Minnesota Three Hundred Dollars ($300.00) for his costs herein expended.

Clerk's costs: $300.00 October 1, 1990

A true copy
JOSEPH F. SPANIOL, JR.
Test:
Clerk of the Supreme Court
of the United States
Certified this 2nd day
of Nov., 1990
By Francis J. Cordon
Chief Deputy

SUPREME COURT OF THE UNITED STATES

No. 90-168

Bruce Philip Larson,

Petitioner,

v.

Minnesota

ORDER ALLOWING CERTIORARI. Filed October 1, 1990.

The petition herein for writ of certiorari to the Supreme Court of Minnesota is granted.

A true copy
JOSEPH F.SPANIOL, JR.
Test:
Clerk of the Supreme Court
of the United States
Certified this 2nd day
of Nov., 1990
By Francis J. Cordon
Chief Deputy

STATE OF MINNESOTA

IN SUPREME COURT

C2-88-2379

Court of Appeals

Coyne, J.
Dissenting, Kelley, J.

State of Minnesota,

Respondent,

vs.

Bruce Philip Larson,

Appellant.

Filed March 23, 1990
Office of Appellate
Courts

S Y L L A B U S

1. Trial court did not violate defendant's right of confrontation in admitting extrajudicial statements of available but nontestifying complainant in child sex abuse prosecution where defendant was free to call and cross-examine the child.

2. Although extrajudicial statements may not have been admissible under Minn.

Aff. A P !

Stat. § 595.02, subd. 3(1988), because the declarant was available but did not testify, the statements were admissible under Minn. R. Evid. 803(24)(the catch-all exception) and Minn. R. Evid. 803(4)(statements for purpose of medical diagnosis or treatment).

3. In the future in a case like this the state must call in its case-in-chief an available witness whose hearsay statements are being admitted against the defendant if the defendant so requests.

4. Effect of determination of competency of child witness is not a factor which trial court necessarily must consider in making competency determination.

Reversed; judgment of conviction affirmed.

Considered and decided by the court en banc without oral argument.

O P I N I O N

COYNE, Justice.

In its decision in this case the court of appeals concluded that the trial court erred in admitting certain extrajudicial statements made by an available but nontestifying complainant in a child sex abuse prosecution. State v. Larson, 447 N.W.2d 593, 597 (Minn. App. 1989). The court of appeals ruled that the error was prejudicial error, assuming that the complainant was competent, as the trial court determined, and therefore available. Id. at 598-99. The court ruled, however, that the trial court may not have realized the effect of its determination that the child was competent, and it remanded with instructions that if the trial court on remand changed its competency determination based on its awareness of the effect of the determination, then a new trial would not

be needed. Id. One member of the panel, arguing that a new trial was required, dissented from the remand for a reconsideration of the issue of competency. Id. at 600. We granted both the defendant's petition for review and the cross-petition for review filed by the state. Having concluded that the trial court did not err in admitting the hearsay statements of the child, we reverse the decision of the court of appeals and affirm the judgment of conviction.

The child in this case, B., was born in May of 1983. On separating from defendant, B.'s mother was awarded custody of B., subject to defendant's visitation privileges. In late April 1987, when she was not quite four years old, the child complained to her mother of vaginal soreness and burning urination. Her mother took her to a family practice clinic. The

physician's assistant, who conducted the examination, saw redness and swelling around the vaginal opening. Suspecting abuse, the examiner asked B. who had touched her. B. replied "Daddy" had touched her with "his bone" that "came out of his pants." B. said it had hurt and that she had asked him to stop.

Visits were temporarily discontinued pursuant to a court order obtained May 2, 1987, in the district court in the county where defendant resides.

On May 7, 1987, B. made more statements about the abuse to a child protection specialist. She said "someone" had put his penis "between her legs and up her butt." SHe would not say who the "someone" was because "she loved her Daddy and she didn't want him to get into trouble." She said the abuse happened "in her Daddy's house."

Defendant retained an attorney and obtained a court order in June allowing supervised visits.

B. was evaluated psychologically by a doctor, who talked with her four times. He concluded that there was a "high probability" that she had been involved in "inappropriate sexual activity."

On July 31, 1987, after a hearing, the court ordered reinstatement of defendant's unsupervised visitation privileges.

B. began weekly psychotherapy with Dr. Susan Lund of Midwest Children's Resource Center in August. On October 22, 1987, B. told Dr. Lund that defendant "pushed at her with his penis." She demonstrated this with anatomically correct dolls and said it happened during the recently reinstated unsupervised visits.

Hennepin County, the county of the mother's residence, obtained an order

assuming custody of B. and her younger brother and terminating defendant's visitation privileges. More people interviewed B. in November and this prosecution was commenced in December of 1987.

The omnibus hearing was held in the district court in the county where the charged abuse occurred in June of 1988 shortly before trial was to begin. The hearing was held on the state's motion for permission to use the out-of-court statements of the complainant and on the defendant's motion to suppress the statements on the ground that their admission would violate defendant's constitutional right of confrontation. The parties stipulated, but only for the purposes of the hearing, that B., then five, was incompetent to testify. The trial court ruled that the statements were

admissible under Minn. Stat. § 595.02, subd. 3(1988).[1] As the statute is worded, the statements cannot be admitted pursuant to the statute unless the child either (a) testifies at trial or (b) is unavailable and there is corroborating evidence. After ruling as it did, the trial court granted a continuance to the defendant so that the defense could try to obtain expert testimony and also so that defendant could decide whether to call B, to testify.

Defendant renewed his motion at the reconvened omnibus hearing in August, shortly before the rescheduled trial date. In support, he cited Coy v. Iowa, 487 U.S. 1012 (1988). The trial court correctly ruled that Coy did not apply. In the order

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[1] Although the trial court had ruled that B's videotaped statement made in November 1987 was inadmissible, at trial the videotape was admitted into evidence and shown to the jury pursuant to the parties' stipulation.

the trial court said that admissibility of the statements was conditioned on the unavailability of the victim.

On August 30, the first day of trial, defense counsel made a continuing objection to the out-of-court statements on the ground that their admission in evidence would violate defendant's right of confrontation. The trial court said defendant would have to make an additional objection if another ground developed. Defendant also said he intended to call B. The trial court therefore conducted an in-chambers competency hearing. The court said, "It is understood that neither party --'if the court finds [B.] is competent * * * has to call her if (that party doesn't) wish to do so." The trial court subsequently determined that B. was competent. Defendant did not call B. When the state introduced B.'s statements,

defendant made a continuing objection on hearsay grounds.

The jury found defendant guilty of criminal sexual conduct in the second degree.

The court of appeals, in concluding that the trial court erred in admitting the hearsay statements of the child, ruled (1) that the trial court's determination that the victim was competent meant that she was available, which in turn meant that both the statute and the constitution precluded use of the victim's out-of-court statements unless the state called her as a witness; (2) that Minn. Stat. § 595.02, subd. 3 deprives the courts of authority to admit out-of-court statements of child sex abuse victims pursuant to Minn. R. Evid. 803(24), the so-called catch-all exception; and (3) that Minn. R. Evid. 803(4), dealing with the admission of statements made for the

purpose of medical diagnosis or treatment, does not afford a basis for admitting a victim's statement as to the identity of her abuser. We disagree with all of these conclusions and the reasoning underlying them.

First, the Constitution does not preclude the use of the victim's out-of-court statements unless the state has called her as a witness. In State v. Koonsman, 281 N.W.2d 487, 490 (Minn. 1979), we rejected a defendant's contention that he was denied his right of confrontation by the state's failure to call the victims to testify at the omnibus hearing on the issue of the admissibility of identification testimony. We stated:

> We have rejected similar arguments before--see, e.g., State v. Maloney, 295 Minn. 262, 204 N.W.2d 202 (1973),--and we do so again. The objectives of the confrontation clause and the compulsory-process clause are to assist the defendant in securing

> the presence of witnesses and to enable the defendant to examine witnesses whose statements are used against him at trial. Westen, Confrontation and Compulsory Process, 91 Harv. L. Rev. 567, 616. Stated differently, confrontation and compulsory process "work in tandem toward a common goal of assisting the defendant in producing and examining witnesses at trial." Ibid., p. 622. In any event, even if it could be said that the prosecutor breached some duty to call the victims, defendant should not be able to claim that the interests served by confrontation and compulsory process were not served in this case because he had the right to call the victims at the hearing. Any other rule would permit a defendant to challenge his conviction in bad faith by pointing to the prosecutor's failure to call a witness whom defendant by his own action demonstrated he had no desire to examine.

Id.

Subsequently, in United States v. Inadi, 475 U.S. 387, 394 (1986), the United States Supreme Court ruled that the confrontation clause does not normally require a showing that the declarant is

unavailable in order to admit out-of-court statements. The out-of-court statements in Inadi were made by nontestifying but available con-conspirators of the defendant. The Court said that the unavailability rule was developed in cases involving testimony given in an earlier trial, where there is good reason for such a rule, but that the rule does not apply to many kinds of hearsay admitted in criminal trials. Id. at 392-94. Recognizing that it would impose a significant practical burden on the prosecutor to insure the availability of declarants even when neither the prosecutor nor the defense wished to examine the declarant at trial, the Court rejected an unavailability rule:

> Any marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarant who are available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the

> defendant himself can call and cross-examine such declarant, cannot support an unavailability rule. We hold today that the Confrontation Clause does not embody such a rule.

Id. at 399-400.[2]

The same reasoning applies here. As in Inadi, it is not at all clear that it was in the interests of the defendant that the declarant be called by either side. It may well have been better for the defendant

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[2]In a footnote the Court also said:

> It is not clear from the Court of Appeals' opinion whether in order to meet its burden of showing unavailability, the prosecution would be required to call the declarant as a witness, or only to insure that the declarant is available for testimony if needed. The unavailability rule suffers from many of the same flaws under either interpretation, and in fact may be even less defensible under an interpretation requiring the prosecution to call each declarant as a witness.

475 U.S. at 398 n. 10.

to go to the jury and challenge the ambiguity of the child's statements (when she said that the abuse occurred in defendant's house but would not say who did it) than to have the child called and possibly testify in court that it was the defendant who did it. Given the circumstances of this case, the Inadi approach makes sense to us, at least with respect to any constitutional claim.

Read literally, section 595.02, subdivision 3, recognizes the admissibility of a child's out-of-court statements only if the child either testifies or is unavailable as a witness. The legislature enacted the statute in 1984, two years before the United States Supreme Court made it clear in Inadi that the unavailability of the declarant is not prerequisite to admissibility of hearsay evidence against the defendant in a criminal case.

Understandably, since the question had not yet been resolved, the legislature took the safe constitutional course and codified what it understood the confrontation clause of the sixth amendment required in order to make out-of-court statements admissible.

It may well be that in applying the statue as a matter of comity,[3] we could construe the statute as not requiring the state to call a child declarant who is

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[3]the court has the primary responsibility under the separation of powers doctrine for the regulation of evidentiary matters but has enforced reasonable statutory rules of evidence as a matter of comity where the rules were not in conflict with the Minnesota Rules of Evidence. State v. Dana, 422 N.W.2d 246, 259 (Minn. 1988); State v. Willis, 332 N.W.2d 180, 184 (MInn. 1984). We disagree with dictum contained in opinions of the court of appeals deferring to the legislature as the primary regulator of evidentiary matters. E.g., In re Proposed Suspension, Revocation or Non-Renewal of the Nursing Home Licenses of Parkway Manor Healthcare Center and Innsbruck Healthcare Center, 448 N.W.2d 116, 120-21 (Minn. App. 1989), pet. for rev. denied (Minn., January 18, 1990).

available, at least where, as here, the defendant has not requested the state to call the child but has expressed his intention to call the child to testify. However, we see no need to rely on the statute to sustain the admission of the statements in this case.

By enacting section 595.02, subdivision 3, the legislature did not deprive the court of authority to admit extrajudicial statements of child complainants or witnesses pursuant to any court promulgated rule of evidence. As we have already noted, supra at n. 3, we have the primary responsibility under the separation of powers doctrine for the regulation of evidentiary matters. Moreover, there is no reason to believe that the legislature was attempting to preempt the field. Indeed, the statute expressly authorizes the admission of

certain out-of-court statements "not otherwise admissible by statute or rule of evidence," signifying an intention only to supplement the rules of evidence.[4] Here the out-of-court statements were admissible under two different rules of evidence, Minn. R. Evid. 803(24) and 803(4).

Minn. R. Evid. 803(24), one of the two so-called "catch-all" exceptions to the

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[4] In State v. Bellotti, 383 N.W.2d 308, 313 (Minn. App. 1989), pet. for rev. denied (Minn. April 24, 1986), the court of appeals upheld the admission of certain out-of-court statements pursuant to Minn. R. Evid. 803(24), where those statements were deemed inadmissible under the statute. We have since rejected, in State v. Dana, 422 N.W.2d 246, 250 (Minn. 1988), the conclusion of the court of appeals in Bellotti that the statements by one child about assaults on another child are inadmissible under the statute, but we have not rejected the conclusion that statements inadmissible under the statute may be admitted under one of our Minnesota Rules of Evidence.

hearsay rule,[5] provides that a hearsay statement may be admitted even if not admissible under any of the other exceptions to the hearsay rule if the statement has "equivalent circumstantial guarantees of trustworthiness" and certain other conditions are met.[6] Relevant cases

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[5]The other is Minn. R. Evid. 804(b)(5). As the 1977 committee comment makes clear, but for the requirement of unavailability in rule 804(5), this exception is identical to rule 803(24).

[6]The rule provides that, even though the declarant is available as a witness, a statement not specifically covered by any of the other hearsay exceptions but having "equivalent circumstantial guarantees of trustworthiness" is admissible:

> [I]f the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement

of this court relying on rule 803(24) include State v. Ortlepp, 363 N.W.2d 39, 44 (Minn. 1985) (ruling admissible accomplice's prior statement as substantive evidence under the rule and citing other cases involving the catch-all exceptions). We are satisfied that the out-of-court statements by the victim in this case had sufficient circumstantial guarantees of trustworthiness to justify their admission under this rule. United States v. Shaw, 824 F.2d 601, 610 (8th Cir. 1987)(trial court did not abuse its discretion in admitting, under identical federal version

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> may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name, address, and present whereabouts of the declarant.

App. A p. 20

of this rule, testimony by social worker about interview with 11-year-old victim of sexual abuse by foster father where strong circumstantial guarantees of trustworthiness were present), cert. denied, 484 U.S. 1068 (1988).

Similarly, the statements made for the purpose of medical diagnosis or treatment are independently admissible under Minn. R. Evid. 803(4).[7] Citing State v. Dana, 422 N.W.2d 246 (Minn. 1988), the court of appeals held that the trial court may not

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[7]Rule 803(4) provides that statements made for purposes of medical diagnosis or treatment are not excluded by the hearsay rule even though the declarant is available as a witness. Statements covered by the rule are:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

rely on this rule to admit statements identifying the abuser. In Dana, however, we were not concerned with the admissibility of a patient's statements made for purposes of medical diagnosis or treatment [the type of statement covered by rule 803(4)] but rather with the admissibility of expert opinion testimony going to the identity of the child abuser. Dana, 422 N.W.2d at 250. In a number of cases, the Eighth Circuit of the United States Court of Appeals has upheld the admission under Fed. R. Evid. 803(4) of the victim's statement identifying the abuser on the theory that the identity of the abuser is pertinent to treatment. See, e.g., United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987)(the nature and extent of psychological problems which ensue and the nature of the treatment depend often on knowing the identity of the

abuse); see also, Golden v. State, 674 P.2d 721, 725 (Wyo. 1983), cert. denied, 467 U.S. 1253 (1984). We agree with the reasoning of these cases on this particular point.

We recognize, however, that a defendant who wants to cross-examine an available child witness whose extrajudicial statements are being used by the state should not be compelled to call the child as a witness if the defendant would prefer that the state call the witness. Therefore, using a modified version of the approach suggested by Professor Westen,[8] we hold that in future cases of this kind the state must, when expressly requested by the defendant to do so, call in its case-in-chief an available witness whose hearsay

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[8] See Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 617-18 (1978).

statements are being admitted against the defendant.

Since we have concluded that the trial court did not err in admitting the extrajudicial statements of the child complainant, there is no need to decide whether the court of appeals erred in ruling that the effect of the determination of the competency of a child witness is a factor to be considered in making that determination. Inasmuch as the availability of the witness is not determinative of the admissibility of extrajudicial statements, the problem which prompted the court of appeals' ruling should not recur. Moreover, relevant cases of this court do not suggest that the effect of the competency determination on the trial of the case is a factor which should be considered in deciding competency. Cf. State v. Amos, 347 N.W.2d

498, 501 (Minn. 1984); State v. Yanke, 336 N.W.2d 299, 300 (Minn. 1983).

In summary, we hold that the extrajudicial statements of the child complainant who was available to both prosecution and defendant but called by neither to testify were properly admitted. Accordingly, we reverse the decision of the court of appeals and affirm the defendant's conviction.

Reversed; judgment of conviction affirmed.

KELLEY, Justice (dissenting):

I respectfully dissent. At all steps of this criminal prosecution the defendant duly objected to the admission of out of court statements of the alleged victim on the grounds that since the testimony of the victim was crucial to the establishment of the elements of the crime charged, the state had the obligation to produce the victim in court for examination and cross-examination under the Sixth Amendment to the United States Constitution and Article I, Section Six of the Minnesota Constitution, each of which provides that the "accused shall enjoy the right * * * to be confronted with the witnesses against him." Any statute or court-promulgated rule of evidence, or any concern for "practical problems of prosecutors," in my view, cannot dilute that constitutional

mandate. Moreover, admission of evidence in violation of the confrontation clause is seldom, if ever, harmless. State v. Hansen, 312 N.W.2d 96, 102-105 (Minn. 1981). I would hold that if the state wishes to establish the crime by victim testimony, which is almost always the case in this type of prosecution, it must do so by producing the alleged victim on the witness stand in open court so the accused may be afforded his constitutional right of confrontation.

Consequently I would remand to the trial court for a new trial.